UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RESILIENT FLOOR COVERING PENSION FUND, et al., Plaintiff(s), v. M & M INSTALLATION, INC., et al, Defendant(s).	No. C08-5561 BZ **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This case is before me on remand from the Ninth Circuit to resolve cross-motions for summary judgment. The Circuit "encouraged" me to consider whether Simas Floor is liable to Plaintiffs under section 1392(c) of the MPPAA for engaging in a transaction, a principal purpose of which was to "evade or avoid" withdrawal liability.[1] Resilient Floor Covering Pension Fund, et al. v. M&M Installation, Inc., 630 F.3d 848, 855 (9th Cir. 2010). The Circuit also instructed me to

[1] All parties have consented to my jurisdiction, including entry of final judgment, pursuant to 28 U.S.C. § 636(c) for all proceedings.

determine whether "sections 1301(b)(1) and 1392(c) [of the MPPAA] are the sole means for recovery of withdrawal liability from companies related to the union signatory" and to "revisit whether a triable issue of fact exists" regarding the second element of the alter ego standard set forth in UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465 (9th Cir. 1994). Id. The parties have raised a few other issues, including veil piercing and successor liability.

The factual background of this case remains undisputed and is set forth in detail in both my prior order (Resilient Floor Covering Pension Fund v. M & M Installation, Inc., 651 F. Supp. 2d 1057 (N.D. Cal. 2009)), as well as in the Ninth Circuit's order (630 F.3d 848), and will not be repeated here. New, material facts introduced by the parties are noted below.[2]

LIABILITY UNDER SECTION 1392(c)

Section 1392(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c). The term "purpose" is not defined in the statute, and the Ninth Circuit has never construed this word as used in this section. The word must therefore be construed in accordance with its ordinary and natural meaning, United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994); and "the overall policies and objectives of the statute." Brown v.

[2] To the extent that the court relies on any facts objected to by either party, those objections are **OVERRULED**.

Gardner, 513 U.S. 115, 117-19 (1994).

The noun "purpose" means "something one intends to get or do; intention; aim," and the verb means "[t]o intend, resolve, or plan." Webster's New World Dictionary of the American Language (2d ed. 1972). Other courts that have confronted this issue have determined that section 1392(c) requires knowledge, intent or awareness of the withdrawal liability before liability can be imposed under this section. See, e.g., SUPERVALU, Inc. v. Bd. of Trs. of the Southwestern Pa. & W. Md. Area Teamsters & Emplrs. Pension Fund, 500 F.3d 334, 341 (3d Cir. 2007) (stating that section 1392(c) requires "intent" and that employers are prohibited from acting "in bad faith"); Santa Fe Pac. Corp. v. Central States, Southeast & Southwest Areas Pension Fund, 22 F.3d 725, 727 (7th Cir. 1994) ("The issue is purpose, a state of mind inferred from testimony and other evidence."); I.L.G.W.U. Nat'l Retirement Fund v. Edelman, Case No. 92-4890, 1995 U.S. Dist. LEXIS 742, WL 25912, at *10 (S.D.N.Y. Jan. 23, 1995) ("Without any evidence that the Defendants . . . had access to knowledge about a withdrawal liability, this Court cannot rule that, as a matter of law, a principal purpose of the Defendants' transfers was to avoid or evade withdrawal liability."); Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Zacek Indus., Inc., Case No. 92-2253, 1994 U.S. Dist. LEXIS 6483, WL 201042 (N.D. Ill. May 17, 1994)("ERISA provides that withdrawal liability shall be determined without regard to transactions, which have as a principal purpose the intent to evade or avoid such

liability.").

Based on the plain language of the statute, and other courts' interpretation of the term "purpose," it appears that there is an intent or knowledge requirement, *i.e.*, that in order to be found liable under this section, an employer must have been aware of its withdrawal liability and must have entered into a transaction, a principal purpose of which was to evade or avoid the liability. Put differently, this section does not seem to apply to situations where an employer engages in a transaction, *the effect* of which is to evade or avoid withdrawal liability, unless the employer was aware of its liability and factored that into its decision.

Here, there is no evidence that either Simas Floor or M & M had the intent required by the statute. All parties agree that Simas Floor and M & M first became aware of M & M's withdrawal liability in October 2004, when they received the Pension Fund's notice. Since neither Simas Floor nor M & M knew of M & M's withdrawal liability until that time, no transaction committed before then had a specific purpose of evading that liability. Nor have Plaintiffs provided evidence of a transaction after October 2004 that Simas Floor or M & M engaged in, a principal purpose of which was to avoid the withdrawal liability. Instead, as Simas Floor points out, M & M paid the withdrawal liability for three and a half years after it received the Pension's notice before winding up its operations in April 2008.

In light of the undisputed evidence on the record, Plaintiffs have failed to show that Simas Floor or M & M

engaged in a transaction, a principal purpose of which was to evade or avoid M & M's withdrawal liability. Accordingly, Defendants' motion on Plaintiffs' section 1392(c) claim is **GRANTED** and Plaintiffs' motion is **DENIED**.

APPLICATION OF THE ALTER EGO DOCTRINE TO ERISA

I turn next to whether sections 1301(b)(1) and 1392(c) are the sole means for recovery of withdrawal liability from companies related to the union signatory.[3] If the answer is yes, Simas Floor cannot be held responsible for M & M's withdrawal liability under an "alter ego" theory.

A statutory remedy is the exclusive remedy for a violation of that statute in two instances: (1) where Congress expressly has stated it is the exclusive remedy; or (2) where Congress has enacted such a comprehensive remedial scheme that it clearly intended there be no other remedy. See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106-7 (1989). The key to the inquiry is the intent of the Legislature. "We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation

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[3] Defendants seek a declaration that they are not liable under under §1301(b)(1)'s "common control" theory, even though Plaintiffs have never sought relief under this theory. Declaratory relief is discretionary by statute (28 U.S.C. § 2201(a)) and requires an actual controversy. See, e.g., North County Communs. Corp. v. Cal. Catalog & Tech., 594 F.3d 1149, 1154 (9th Cir. 2010). Nonetheless, having been instructed to enter declaratory relief for Defendants on this theory, **I DECLARE** that Simas Floor is not liable for M & M's withdrawal liability under section 1301(b)(1), since they are not under common control, as that term is defined in that section.

to determine congressional intent." Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 13 (1981).

Nothing in section 1392(c) explicitly states it is the exclusive remedy, and Defendants do not so contend.[4] When Congress wants exclusivity, it knows how to draft such a provision, as in section 1341 of ERISA, which states that a plan "may be terminated only" in accordance with specified subsections. 29 U.S.C. § 1341(a)(1), (b)(1). Section 1392(c) does not include such restrictive language.

Nor is there any evidence that Congress intended section 1392(c) to be an exclusive remedy when it enacted the MPPAA. Congress enacted ERISA to protect employees' pension rights. Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414, 416 (1995). It repeatedly recognized that it was promulgating "minimum standards" to ensure "the equitable character of such plans and their financial soundness." 29 U.S.C. § 1001 b(c)(3). Finding that ERISA "did not adequately protect plans from the adverse consequences that resulted when individual employers terminated their participation in, or withdrew from, multiemployer plans," Congress then promulgated the MPPAA. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S.

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[4] As the Ninth Circuit noted, during the first round of summary judgment briefing, Defendants did not dispute that an employer found to be the alter ego of another employer who has incurred withdrawal liability may be responsible for the latter's withdrawal liability, and neither party raised the issue. Now, Defendants seem to admit that some form of alter ego liability exists, but they argue that Simas Floor is not liable for M & M's withdrawal liability because the alter ego theory is not broad enough to apply to this situation.

717, 722 (1984); Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 196 (1997). The MPPAA was designed "(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) . . . to ensure benefit security to plan participants." H.R. Rep. No. 869, 96th Cong., 2d Sess. 71, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 2939; see also Nat'l Shopmen Pension Fund v. Disa, 583 F.Supp.2d 95, 99 (D.D.C. 2008) ("[T]he withdrawal liability payment requirement generally protects the financial integrity of multiemployer plans, prevents withdrawing employers from shifting their burdens to remaining employers, and eliminates an incentive for employers to flee underfunded pension plans.") (citing Milwaukee Brewery, 513 U.S. at 416; Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 216 (1986); R.A. Gray & Co., 467 U.S. at 722-23).

With these goals in mind, Congress can not have intended section 1392(c) to be the "sole route of redress for evading or avoiding withdrawal liability." Resilient Floor, 630 F.3d at 851. To begin, Congress permitted plan fiduciaries, such as plaintiffs seeking to recover withdrawal liability, to "bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451. Nothing in this broad remedial section suggests that Congress intended plan fiduciaries to be limited to section 1392(c) as the "sole route of redress" in a situation such as this.

Second, as pointed out by Plaintiffs' counsel during the hearing, the alter ego doctrine has been a part of the federal

common law governing employer-union relations for a long time. In the context of labor disputes, the alter ego doctrine developed to prevent employers from evading labor law obligations merely by changing or altering their corporate form. See, e.g., Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942); Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel and Restaurant Employees, and Bartenders Int'l Union, 417 U.S. 249, 259 n. 5 (1974); see also Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10 (2d Cir. 1984); Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1984); NLRB v. Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983); Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir. 1983); Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1983); Nelson Electric v. NLRB, 638 F.2d 965, 968 (6th Cir. 1981); NLRB v. Tricor Products, Inc., 636 F.2d 266 (10th Cir. 1980); Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 111-11 (9th Cir. 1979). Nothing in the MPPAA or in its legislative history suggests that Congress intended to eliminate a long recognized method of addressing sham employer entities which undermine collective bargaining agreements. In fact, Congress "intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability." See 126 Cong. Rec. 23,038 (1980) (statement of Rep. Frank Thompson). If Congress wanted to omit these theories of recovery from the statutory framework of the MPPAA, it could have done so. See Astoria Federal Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)

("Congress is understood to legislate against a background of common-law adjudicatory principles.").

Third, when Congress enacted the MPPAA, it did not include a definition of "employer" for purposes of a multi-employer plan.[5] Knowing that the courts had long applied the alter ego and veil piercing doctrines in determining who was an employer in various labor law contexts, it would be incongruous to conclude that Congress intended to exclude that body of law by failing to include a definition of employer in the MPPAA.

The Supreme Court has not addressed whether alter ego or veil piercing remedies are available to recover withdrawal liability. In the Court's only discussion of alter ego liability or veil piercing under ERISA, it declined to decide whether those remedies were permitted under the statute, finding subject matter jurisdiction lacking "even if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA." Peacock

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[5] The definition section of the MPPAA defines a "substantial employer" for purposes of a single-employer plan, but does not define an employer, substantial or otherwise, for purposes of a multiemployer plan. 29 U.S.C. § 1301(a)(2). Title I of ERISA contains a definition section that defines an employer, 29 U.S.C. 1002(5), but that section's definitions are expressly limited to their own subchapter and do not apply to Title IV, which contains the MPPAA. Mary Helen Coal Corp. v. Hudson, 235 F.3d 207, 212 (4th Cir. 2000) (holding definition of "employer" in ERISA Title I inapplicable to Title IV); Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531, 1536 (2d Cir. 1989) (same, finding definition of an employer under MPPAA "must be left to the courts"); see also Nachman Corp. v. Pension Guar. Benefit Bd., 446 U.S. 359, 370-71 (1980) (cautioning that the definitions in Title I are "not necessarily applicable to Title IV").

v. Thomas, 516 U.S. 349, 354 (1996). Nevertheless, with the intent of Congress in mind, numerous courts which have addressed alter ego and veil piercing theories in the context of ERISA and MPPAA claims, have chosen to apply each doctrine. See, e.g., Flynn v. R.C. Tile, 353 F.3d 953 (D.C. Cir. 2004) (alter ego liability enables ERISA trustees to "recover delinquent contributions from a sham entity used to circumvent the participating employer's pension obligations."); Bd. of Trs. v. Foodtown, Inc., 296 F.3d 164 (3d Cir. 2002)(reversing dismissal of plaintiff's claims against alter ego for MPPAA withdrawal liability); Massachusetts Carpenters Central Collection Agency v. Belmont Concrete Corp., 139 F.3d 304 (1st Cir. 1998) (affirming summary judgment under the MPPAA allowing plaintiffs to recover delinquent contributions to a multiemployer pension plan from an alter ego); Lumpkin v. Envirodyne Indus., 933 F.2d 449, 461 (7th Cir. 1991); Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990); United Steelworkers v. Connors Steel Co., 847 F.2d 707 (11th Cir. 1988); Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1220 (2d Cir. 1987); see also, Brown v. Astro Holdings, Inc., 385 F. Supp. 2d 519 (E.D. Pa. 2005) (conducting analysis of congressional intent of MPPAA and concluding that alter ego and veil piercing theories permitted).[6]

[6] Numerous courts have recognized that an individual officer or director may be held personally liable for a corporation's delinquent contributions if "piercing the corporate veil" or "alter ego" liability can be proven; or if the individual defendant commits fraud, acts in concert with a fiduciary to breach a fiduciary obligation; or if the

While the Ninth Circuit has not addressed whether alter ego and veil piercing theories are available under the MPPAA for withdrawal liability, it has long allowed these remedies in ERISA suits involving delinquent contributions. See Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service, Inc., 736 F.2d 516 (9th Cir. 1984); Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987); Board of Trustees v. Valley Cabinet & Mfg. Co., 877 F.2d 769 (9th Cir. 1989); Nor-Cal, 48 F.3d 1465; Trs. of the Screen Actors Guild-Producers Pension & Health Plans v. NYCA, Inc., 572 F.3d 771, 776-77 (9th Cir. 2009). These cases suggest that the Ninth Circuit would likely apply the alter ego and veil piercing theories in a withdrawal liability suit under the MPPAA. Indeed the Ninth Circuit recognized in this case that if there is a "concern" that a double-breasted operation is being used to avoid payment of withdrawal liability, the non-union company "may be responsible as an alter ego employer for the union company's withdrawal liability." Resilient Floor, 630 F. 3d at 854.

Here, interpreting an "employer" subject to withdrawal liability to include an "alter ego" of that employer accords with federal common law and the purposes and policies behind ERISA and the MPPAA. Although developed in the context of the

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individual officer or director personally assumes the obligations of the company under the collective bargaining agreement, thereby qualifying individually as an "employer" under ERISA. See Blackburn v. Iversen, 925 F. Supp. 118, 123 (D. Conn. 1996) (collecting cases).

National Labor Relations Act, the alter ego and veil piercing doctrines have relevance in the ERISA context as well. Because Congress enacted ERISA to protect workers from their employers' attempts to deny them pension benefits, the underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in suits where employees are denied benefits as a result of sham transactions. See, e.g., Pension Ben. Guaranty Corp. v. Ouimet Corp., 711 F.2d 1085 (1st. Cir. 1983); see also Smith v. Cmta-Iam Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984) (ERISA "is remedial legislation which should be liberally construed in favor of protecting participants in employee benefits plans."). Given the broad remedial purpose of ERISA and the MPPAA, as well as the abundance of case law applying the alter ego doctrine to cases brought under ERISA and the MPPAA, I find its application appropriate in this case.

APPLYING THE ALTER EGO DOCTRINE

The Ninth Circuit instructed me to revisit whether there is any material fact in dispute regarding the second element of the alter ego test as articulated in Nor-Cal. "The Nor-Cal alter ego test requires proof (1) that the two firms have 'common ownership, management, operations, and labor relations,' and (2) that the non-union firm is used 'in a sham effort to avoid collective bargaining obligations.'" Resilient Floor, 630 F.3d at 851 (quoting Nor-Cal, 48 F.3d at 1470)). Defendants have never disputed, and do not now dispute, that the first element of this test is satisfied. (Def.'s Opp. p. 27:5-8.) Regarding the second element, the

Ninth Circuit has stated that "[u]nder the alter ego doctrine, the court considers the interrelation of operations, common management, centralized control of labor relations, and common ownership. If these factors show that the transaction is a sham designed to avoid the obligations of a collective bargaining agreement, the nonsignatory employer will be bound." Gateway Structures, Inc. v. Carpenters 46 Northern California Counties Conference Bd. etc., 779 F.2d 485, 488 (9th Cir. 1985) (citing Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1276-77 (9th Cir. 1984)); see also A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 518 (9th Cir. 1989) ("The focus of the alter ego test, unlike the single employer test, is on the existence of a disguised continuance of the same business or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations."). Indeed, both parties agree that double-breasted operations — those in which the same contractor owns both union and non-union companies — are legal as long as they are not used to avoid collective bargaining obligations. Nor-Cal, 48 F.3d at 1469-70. But where a double-breasted operation is used to avoid payment of withdrawal liability, "then the non-union company may be responsible as an alter ego employer for the union company's withdrawal liability." Resilient Floor, 650 F.3d at 854. The "critical inquiry" is whether an employer is using a non-union company in a sham effort to avoid collective bargaining obligations. Stevens, 743 F.2d at 1276 & n.6.

After reviewing the substantial undisputed evidence presented by the parties about the manner in which Simas Floor and M & M operated, I conclude that for purposes of imposing pension fund withdrawal liability, Plaintiffs have established that Simas Floor and M & M were alter egos since Simas Floor operated M & M in such a manner to ensure that Simas Floor had total control over whether M & M could meet its collective bargaining obligations. Plaintiffs produced undisputed evidence that Simas Floor formed M & M to allow Simas Floor to bid on union jobs, and that M & M had no source of business other than from Simas Floor. M & M received all of its contracts and income from Simas Floor, and Simas Floor paid M & M only enough to cover M & M's overhead and expenses, so that M & M's net income was close to zero. This meant that M & M, controlled by Simas Floor, permitted Simas Floor to take M & M's profits for Simas Floor's own use. In this manner, Simas Floor assured that M & M would never be in a position to be able independently to meet its collective bargaining obligations, be they paying contributions or withdrawal liability. Given the direction and flow of profits that existed between these two companies, I find that this is the type of double-breasted operation that the MPPAA was implemented to prevent. M & M's collective bargaining obligations could only be met if Simas Floor funded them. Simas Floor cannot now hide behind the collapse of M & M as an excuse for avoiding the withdrawal liability that M & M incurred.

For these reasons, Plaintiffs are **GRANTED** summary

judgment against Simas Floor on the grounds that Simas Floor and M & M were alter ego employers.

VEIL PIERCING

Plaintiffs next claim that the individual shareholders of M & M should be held liable for M & M's withdrawal liability under a veil piercing theory. Both parties have moved for summary adjudication of this claim.

Under federal common labor law, in deciding whether to pierce the corporate veil, a reviewing court must consider three factors: 1) the amount of respect given to the separate identity of the corporation by its shareholders; 2) the degree of injustice visited on the litigants by recognition of the corporate entity, and 3) the fraudulent intent of the incorporators. Seymour, 605 F.2d at 1111. The Ninth Circuit articulated these three factors based on its review of "the jumble of federal decisions" that had considered federal substantive law on disregard of the corporate entity, noting that "[f]ederal decisions naturally draw upon state law for guidance in this field" and that "under different circumstances" another rule might apply. Id. Plaintiffs must prevail on the first threshold factor and on one of the other two. See Board of Trustees v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 773 (9th Cir. 1989).

Plaintiffs argue that the shareholders of M & M are liable for the withdrawal liability because the assets of Simas Floor and M & M were commingled. There is no evidence in the record, however, that the *shareholders* commingled their personal assets with either M & M or Simas Floor. While the

comingling of funds between corporations may be a factor in piercing the corporate veil of one of the corporations, Plaintiffs do not cite any authority for the proposition that the commingling of funds between two corporations is the type of "serious abuse" of the corporate identity that permits courts to pierce the veil of a corporation to reach its *shareholders*. Instead, Plaintiffs cherry pick quotes from Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825 (1962), wherein the court itemized a list of factors that various California courts have considered relevant for the purposes of determining whether to disregard the corporate structure. (Pl.'s Reply Br. p. 11.) None of the cases cited in Associated Vendors establishes that the shareholders, directors or officers of two corporations that are found to be a single entity can be held liable for the corporations' debts where there is no evidence that those individuals improperly commingled their assets with the corporations' assets.

Indeed, the authority cited by Plaintiffs involves situations where a plaintiff brought suit to hold an individual shareholder liable for having commingled his or her personal assets with that of the corporation. Valley Cabinet & Mfg. Co., 877 F.2d at 772-73; Seymour, 605 F.2d at 1112. The other cases cited by Plaintiffs seem to hold that individual shareholders *cannot* be found liable just because there are two corporations acting as a single enterprise. See, e.g., Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service, Inc., 736 F.2d 516, 523-524 (9th Cir. 1984) ("Uriarte Clean-Up does not appear to contest the

finding that it and Developers comprise a single enterprise. That finding permits the liabilities of Developers to be attributed to Uriarte Clean-Up and vice versa. However, the stockholders cannot be held personally liable for the liabilities of the two corporations simply because they are engaged in a single enterprise."); Arnold v. Browne, 27 Cal. App. 3d 386, 396 (1972) (". . . the intermingling of the two corporations has no relevance to the liability of the individual defendants."); see also Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124 (1933).

Even given the import of this order – that Simas Floor and M & M are alter egos – there is still no basis to pierce either company's veil to hold its individual shareholders (the same former shareholders of M & M) liable for the withdrawal liability without evidence that the individual shareholders commingled their assets with that of the corporate entity. Cf. Valley Cabinet, 877 F.2d at 773.[7]

Plaintiffs also argue that the shareholders of M & M should be held responsible for its withdrawal liability because the evidence shows that M & M was undercapitalized from its inception. Defendants deny that M & M was undercapitalized, and submit various tax documents and other evidence to show that M & M was adequately capitalized at its formation, with *inter alia*, $126,416 in shareholder equity,

[7] Nor have Plaintiffs made any showing that, once Simas Floor has paid M & M's withdrawal liability, justice would require piercing either corporation's veil.

trucks, and a workers compensation bond. (Def.'s Opp. Br. 19.) Whether M & M was adequately capitalized presents a disputed issue of fact, but having failed to make the threshold showing under the first prong that M & M's shareholders disregarded the corporate form through improper commingling or other acts, the factual dispute over M & M's undercapitalization is no longer material.[8]

I therefore find no basis to summarily adjudicate this claim in Plaintiffs' favor, and, since Plaintiffs carry the ultimate burden of persuasion on this claim and have failed to carry their burden of production with respect to Defendants'

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[8] Relying on state law, Plaintiffs argue that undercapitalization alone is sufficient to pierce the corporate veil. Under California law, the alter ego doctrine and the veil piercing doctrine are often conflated. The two requirements for application of either doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. Automotriz del Golfo de California S. A. de C. V. v. Resnick, 47 Cal.2d 792, 796 (1957) (citing H. A. S. Loan Service, Inc. v. McColgan, 21 Cal.2d 518, 523 (1943); Stark v. Coker, 20 Cal.2d 839, 846 (1942)). Generally, however, inadequate capitalization is a factor that courts have considered under the second prong. See, e.g., Carlesimo v. Schwebel 87 Cal. App. 2d 482, 492 (1948) ("[W]e turn directly to the problem here presented, namely, whether, as a matter of law, it should be held that this corporation was so under-financed that to recognize the corporate entity would be to work a fraud on creditors of the company. There can be no doubt that the fact, if such be the fact, that a corporation is organized with an obviously inadequate capital setup, such fact may be considered in determining whether the corporate entity should be disregarded."). But, even if analyzed under the first prong, California courts have held that undercapitalization is only one of many factors that a court may consider, particularly given that "The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one . . . ." Stark, 20 Cal.2d at 846.

cross-motion, Defendants' motion is **GRANTED**. See Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000); Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000).

SUCCESSOR LIABILITY

Plaintiffs' final claim is for successor liability. Under the "substantial continuity" test courts look to, *inter alia*, the following factors: continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987). "Continuity of work force is a major consideration in successorship cases." Audit Services, Inc. v. Rolfson, 641 F.2d 757, 763 (9th Cir. 1981) (citing Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974)).

The evidence on the record establishes that, for some period of time after M & M's negotiations with the union broke down, the union permitted Simas Floor to finish its then-current projects for non-union wages. After those projects were completed, M & M laid off the flooring installation employees who returned to work after the strike because M & M and Simas Floor had no need for another non-union flooring installation shop. Only two (out of twelve) of M & M's former flooring installers went to work for Simas Floor as flooring installers. Thereafter, Simas Floor stopped bidding on union flooring installation jobs since it no longer had a collective bargaining agreement with that union, and focused instead on tile setting work because M & M's tile setters were still

covered by a collective bargaining agreement with a different union. M & M continued to perform tile setting work through 2008. In April 2008, M & M wound up its affairs, including selling its assets (three work trucks) to Simas Floor. The undisputed evidence demonstrates that there was not a continuity in operations between M & M and Simas Floor sufficient to find successor liability. Accordingly, Plaintiffs' motion is **DENIED** and Defendants' motion is **GRANTED**.

CONCLUSION

For the reasons stated above, **IT IS ORDERED** as follows:

1. Defendants' motion on Plaintiffs' §1392(c) claim is **GRANTED** and Plaintiffs' motion is **DENIED**.

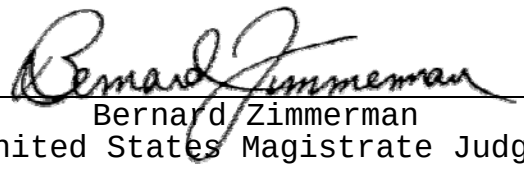
2. Defendants are **GRANTED** declaratory relief that Simas Floor and M & M are not under common control.

3. Plaintiffs' motion for summary judgment that Simas Floor is liable for M & M's withdrawal liability as its alter ego is **GRANTED** and Defendants' motion is **DENIED**.

4. Defendants' motions for summary judgment on Plaintiffs' veil piercing claim and successor liability claim is **GRANTED** and Plaintiffs' motions are **DENIED**.

Judgment shall be entered accordingly.

Dated: February 29, 2012



Bernard Zimmerman
United States Magistrate Judge

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